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Thirty-third session

SUMMARY RECORD OF THE 699th MEETING

Held at Headquarters, New York,
on Tuesday, 27 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 3.05 p.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/471 and Add.1-9)

Draft recommendation 23 (continued)

1. The CHAIRMAN invited the Commission to resume consideration of the draft recommendations in the draft Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/471/Add.9).

2. Mr. SARIE ELDIN (Egypt) said that draft recommendation 23 (f) was very important and should not be changed. It should be borne in mind that the recommendation dealt with both financial and commercial aspects of proposals.

3. Ms. NIKANJAM (Islamic Republic of Iran) said that her delegation was satisfied with draft recommendation 23 as it stood, including (f).

4. Ms. FOLLIOT (France) said that her delegation had several amendments to propose to draft recommendation 23. First, it was in favour of eliminating (f) as superfluous, since comparison of the proposals with the proposed contractual terms was implicit in the entire process of evaluating proposals. Logically, (f) should either be eliminated from draft recommendation 23 or added to draft recommendation 22, since it could be considered equally pertinent, or self-evident, in relation to the technical evaluation.

5. Second, draft recommendation 23 (a) to (e) could be arranged in a more logical fashion. The soundness of the proposed financial arrangements, currently in (e), was in fact the topic of draft recommendation 23. The phrase should be placed first as (a) or in the chapeau. Under it, a distinction should be drawn between two financing modalities, which the bidder should be asked to set forth, one for the period of construction and the other for the period of operation, differentiating, for each phase, between the amount of financing that was to come from operating revenues, such as fees and charges, and the amount that was that to come from government support.

6. Ms. GIOIA (Italy) said that her delegation supported the proposal to delete (f) as superfluous and felt the distinction between the various sources of financing during different phases was valuable. Draft recommendation 23 (d), which referred to financial support from the Government, might be worded more broadly in order to encompass other sources of public-sector financing.

7. Mr. SARIE ELDIN (Egypt) said that there was a very important rationale for the inclusion of (f). Bidders often made exceptions or reservations to the proposed contract terms. Too many reservations might reduce the acceptability of their proposals and might imply longer negotiation times and additional cost to the contracting authority. It was therefore quite legitimate and often necessary, when evaluating a proposal, to take into consideration the extent to which the proposal deviated from the proposed contractual terms.

8. The distinction drawn between financing in the construction and operating phases was a valid one, but his delegation believed that the language of draft recommendation 23 sufficiently covered the situation and should remain unchanged.

9. Mr. WIWEN-NILSSON (Observer for Sweden) said that he fully supported the Egyptian position. It must be borne in mind that, whereas in conventional procurement it was easier for the contracting authority to insist on exact compliance with its terms, such insistence in infrastructure projects had proved to be nearly impossible. For one thing, lenders had an important say in the final contract terms. Draft recommendation 26 and the notes relating to the section (A/CN.9/471/Add.4, paras. 51-84) drew a distinction between negotiable and non-negotiable terms. The non-negotiable terms must, of course, be met in order for any proposal to be considered, but proposals might differ considerably in the number of negotiable deviations. The risk allocation originally proposed by the contracting authority was rarely accepted. It was therefore important for the contracting authority to be able to apply the criterion stated in (f). With regard to financial soundness, he could see the value of distinguishing between different phases.

10. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Commission, at its previous session, had decided to accommodate the full spectrum of procurement situations and allow for flexibility. At one extreme were countries that had already elaborated sophisticated contractual terms or that had legal systems requiring rejection of proposals that did not fully comply with the proposed contractual terms. But there were others that would prefer to allow the terms to evolve throughout discussions with the bidders. Some countries insisted on a minimum compliance with the original terms. The concept of non-negotiable terms appeared in draft recommendation 26, and a similar concept was expressed in draft recommendation 24, which spoke of thresholds that must be met before a proposal could be considered.

11. The extent-of-acceptance criterion was not included in draft recommendation 22 because the latter dealt only with technical evaluation, whereas draft recommendation 23 dealt with evaluation of the financial and commercial terms. Commercial terms might include provisions on liquidated damages and other issues related to allocation of risk, which were frequently left to later negotiations.

12. Mr. MARADIAGA (Honduras) noted that the meaning of "proposed contractual terms" in draft recommendation 23 (f) was explained by draft recommendation 20 (c) in the same chapter, which referred to "the contractual terms proposed by the contracting authority". In his delegation's view, (f) was clear and should be left as it stood.

13. Ms. FOLLIOT (France) said she believed that the notion expressed in (f) was implicit in the evaluation process, but if the Commission wished to make it explicit, it should also appear in draft recommendation 22, since the degree to which the proposal complied with technical specifications was also, surely, an evaluation criterion.

14. Mr. LALLIOT (France) said that his delegation wished to propose a compromise, whereby draft recommendations 22 and 23 would begin with similar wording. Draft recommendation 22 would begin: "In conformity with the proposed contractual terms, the criteria for evaluation ..."; draft recommendation 23 would begin: "In conformity with the proposed contractual terms and in order to judge the soundness of the proposed financial arrangements, the criteria for evaluation ...". Draft recommendation 23 (e) and (f) would be taken up into the chapeau. The remaining parts could be rearranged: (c) would be placed first, followed by (a), with the addition of the words "unit price" after "fees", as proposed by the United States delegation; last would come (b) and (d) combined into one, again as proposed by the United States. Nothing would be lost, and logic and elegance would be gained.

15. Ms. MANGKLATAKUL (Thailand) said that her delegation had been convinced of the benefit of retaining (f). Since no purpose appeared to be served by the French proposal, draft recommendation 23 should remain as it stood.

16. Mr. KASHIWAGI (Japan) said that his delegation agreed with the positions expressed by the representative of Egypt and the Secretariat.

17. Mr. PINZÓN SÁNCHEZ (Colombia) said he agreed with the suggestion of Italy that draft recommendation 23 (d) should be more broadly worded, so that it referred to financial support not just from the Government but from other public-sector sources.

18. Mr. ESTRELLA FARIA (International Trade Law Branch) pointed out that the term "Government" had been broadly defined in the notes (A/CN.9/471/Add.1, para. 16).

19. Mr. LALLIOT (France) asked whether the inclusion of the clause expressed in draft recommendation 23 (f) but nowhere in draft recommendation 22 meant that in evaluating technical proposals conformity to specifications was not a concern.

20. Mr. ESTRELLA FARIA (International Trade Law Branch) said that (f) was worded to refer back to the contractual terms mentioned in draft recommendation 20 (c), whereas the whole of draft recommendation 22 referred back to the project specifications and performance indicators mentioned in draft recommendation 20 (b). That meant that the wording of an analogous phrase in draft recommendation 22 would have to be somewhat different. He did not believe, however, that such a phrase would be contrary to the policy worked out by the Commission.

21. The CHAIRMAN said that, as he understood it, the intent of draft recommendation 23 (f) was to draw particular attention to the need for Governments to consider the extent of compliance with the proposed contractual terms relating to commercial aspects when awarding contracts.

22. Mr. WALLACE (United States of America) said that draft recommendations 23 and 24 taken together provided a combination of minimum conformity requirements, or "thresholds", with respect to both technical and commercial aspects, while allowing for more flexibility in proposed contractual terms than was usual in

straight procurement transactions. His delegation thought the right balance had been struck.

23. The CHAIRMAN suggested that draft recommendation 23 should be adopted as drafted, because the concerns expressed were dealt with in subsequent paragraphs.

24. Draft recommendation 23 was adopted.

Draft recommendation 24

25. Mr. WIWEN-NILSSON (Observer for Sweden) said that, for the sake of consistency, the word "financial" should be inserted in the series "technical and commercial aspects".

26. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to a question from the Chairman, said that he did not recall any policy decision by the Commission not to include financial aspects.

27. Draft recommendation 24, as orally amended, was adopted.

Draft recommendation 25

28. Draft recommendation 25 was adopted.

Draft recommendations 26 and 27

29. Mr. WIWEN-NILSSON (Observer for Sweden) pointed out that the heading of the section in the recommendations, "Final negotiations", did not coincide with the heading of the corresponding section in the notes (A/CN.9/471/Add.4, sect. C.6), which read "Final negotiations and project award".

30. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the heading in the notes should be shortened to correspond to the heading in the recommendations, since project awards were dealt with in a later section.

31. The CHAIRMAN said he took it that the Commission wished to make the change suggested by the Secretariat.

32. It was so decided.

33. Mr. SARIE ELDIN (Egypt) asked whether the Secretariat or the expert committee had considered the very common situation in which, after selection of the concessionaire but before the financial closing, lenders called for changes in the agreements. It would be very helpful if some advice could be given to Governments on how to deal with the problem.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the matter had been discussed by the Commission and in consultations with experts. The problem was dealt with briefly in paragraph 70 of the notes on chapter III (A/CN.9/471/Add.4), where it was suggested that the contracting authority should require the final proposals to show that the bidder's main lenders were

comfortable with the commercial terms and allocation of risks. The last sentence of draft recommendation 26 suggested that the final request for proposals should identify certain terms as non-negotiable. The United Kingdom procurement guidelines for privately financed infrastructure projects contained a similar recommendation. What a Government could or should do if lenders nonetheless insisted on reopening certain issues would depend on the country's general policy.

35. The CHAIRMAN said that one aspect of the question was whether the last sentence of draft recommendation 26 was meant to apply not only to the successful bidder but also to third parties, such as the lenders.

36. Mr. NDJOG NYOBE (Cameroon) inquired how the contracting authority was supposed to respond, if two bidders both achieved the best rating.

37. Mr. WALLACE (United States of America), replying to the query raised by the Chairman, referred to the statement in paragraph 83 of the notes (A/CN.9/471/Add.4) that the final negotiations should satisfy the "reasonable requirements" of the selected bidder's lenders. Although the final negotiations had not been discussed, as far as he could recall, there had been some discussion of direct agreements between lenders and contracting authorities. The point raised by the representative of Egypt had indeed been discussed, at a meeting of experts. One positive feature of the draft Guide, which sought to change behaviour rather than merely reporting on it, was to bring to the attention of contracting authorities the pressure which might be exerted on bidders by their lenders, and the need to persuade lenders to commit themselves at an earlier stage. That point was covered in paragraphs 70 and 83 of the notes. However, direct deals between lenders and Governments had not been specifically addressed in recommendation 26.

38. Mr. MYERS (Observer for the International Bar Association) recalled that the matter had been fully discussed at a meeting of experts, but the industry had not yet succeeded in solving the problem, nor could it be solved through the recommendations in the draft Guide. The difficulty was that lenders did not pay attention to projects until they were sure that their team would win the tender; at that point, they often stated that they would not finance the project unless certain particulars were changed. There was a need to tie lenders down at an earlier stage in the project. The only proposal to that effect was the one referred to by the Secretariat, as contained in the notes.

39. Mr. SARIE ELDIN (Egypt) said that recommendation 26 did not meet the concerns of his delegation. His country and others, such as Mexico and Indonesia, were familiar with the situation in which a lender would enter a deal after extensive negotiations, when the project documents had already been signed. Some issues, such as assignment and stepping-in rights, could be covered by direct agreement. On other issues, such as risk allocation, lenders might request an amendment in the actual project documents. The Commission should consider making a recommendation to contracting authorities advising how that situation should be dealt with in a legal sense. Project companies could find themselves in difficulty; being reluctant to lose a contract, they would sometimes leave it to lenders to pursue the negotiations. The Commission could

perhaps stipulate that lenders should not be allowed to renegotiate matters which could not be renegotiated by project companies or bidders.

40. The CHAIRMAN agreed that the issue was an important one which should be drawn to the attention of contracting authorities. He asked whether the problem should be discussed in the notes, or whether the Commission wished to formulate an additional recommendation.

41. Mr. WALLACE (United States of America) pointed out that the Commission was preparing a legislative guide, not a manual on how to deal with banks. The issue would have to be confined to the notes, where it was already discussed, in paragraph 83 of document A/CN.9/471/Add.4. Governments should take a stronger line, stating their requirements clearly in the bidding documents and then holding the bidders to them.

42. Mr. WIWEN-NILSSON (Observer for Sweden) agreed. The Commission should be careful not to include in the recommendations anything which would discourage private-sector financing.

43. Mr. ESTRELLA FARIA (International Trade Law Branch), referring to the question raised by the representative of Cameroon, said that it had not previously been discussed by the Commission.

44. Mr. DARCY (United Kingdom) said that he was familiar with the situation described by the representative of Cameroon. Some countries, including his own, occasionally tried to bring two bidders forward to final negotiations, in order to intensify the competition. That should perhaps be reflected in the language of recommendation 26, by referring to "bidders" in the plural.

45. Mr. WALLACE (United States of America) thought that it would be dangerous to refer to "bidders", which could signify a plurality of bidders, not just two. Competition was certainly a good thing, but it would be better to make reference in the notes to the situation described by the representative of Cameroon.

46. The CHAIRMAN observed that it was a situation which sometimes occurred in high-value projects.

47. Ms. NIKANJAM (Islamic Republic of Iran) favoured the solution proposed by the representative of the United Kingdom.

48. Mr. DARCY (United Kingdom) withdrew his proposal. He agreed with the representative of the United States that it might be hazardous to refer in the recommendation to "bidders" in the plural. However, reference could be made in the notes to the fact that in some situations, it was necessary to take more than one bidder through to final negotiations.

49. Draft recommendations 26 and 27 were adopted.

Draft recommendations 28 and 29

50. Mr. DARCY (United Kingdom) proposed amendments to recommendations 28 and 29. The title "Direct negotiations" was confusing and did not adequately

describe the subject. For the sake of clarity, he suggested replacing it by "Contract award without competition". He was not entirely happy but was prepared to accept recommendation 28 (e) and (f). With regard to recommendation 29, he proposed adding measures to ensure transparency, which was particularly important where there was no competitive procedure. Several of the existing provisions, especially (c), would be irrelevant if there was only one bidder. He therefore suggested deleting (b), (c) and (e), and moving (d) to a later point in the draft Guide, since it was a general consideration which applied in all selection and award procedures. Recommendation 29 (f) should become (b) and should read: "The offer should be evaluated according to the criteria for the evaluation of proposals established by the contracting authority". A new (c), intended to enhance transparency, would read: "Public notices of contract awards should disclose the specific circumstances and reasons for the award without competition". If those proposals were accepted, appropriate amendments should be made to the notes.

51. Mr. WALLACE (United States of America) welcomed those proposals but pointed out that they would alter the section as it stood, which contemplated the possibility of more than one bidder. For example, paragraph 89 (d) of the notes (A/CN.9/471/Add.4) referred to "cases where there is only one source capable of providing the required service", namely, a sole source of procurement. The proposed changes would also affect recommendation 35, concerning direct negotiations with the author of an unsolicited proposal, which would also contemplate more than one bidder.

52. Ms. NIKANJAM (Islamic Republic of Iran) said that her only concern with regard to the United Kingdom proposals was the requirement to disclose, through public notices, the circumstances in which an award had been made. What would happen if those circumstances had to be kept confidential for reasons of security or the national interest?

53. Mr. LALLIOT (France) supported the United Kingdom proposal. The proposed amendment to the title of recommendation 28 would dispel its ambiguity. The text of the recommendation must be altered in consequence, for the sake of consistency. The proposed amendments to recommendation 29, especially the new (c), would provide for greater transparency in the award of contracts.

54. Mr. ESTRELLA FARIA (International Trade Law Branch), referring to the point raised by the Iranian representative, said that no requirement concerning security had previously been included in recommendation 29. If the Commission so wished, an appropriate reference such as that in recommendation 28, subparagraph (c), could be included in recommendation 29. Concerning the question of a plurality of bidders, which would enhance competition, that situation had in fact been envisaged previously by the Commission in recommendation 29. An appropriate reference could be made in the notes to the desirability of ensuring a minimum level of competition if negotiations involved more than one party.

55. Mr. RENGER (Germany) said there was no need to revert to a previous decision by the Commission. It had been made clear, in paragraph 128 of the previous year's report, that the title "Direct negotiations" should be retained.

The meeting was suspended at 4.25 p.m. and resumed at 4.55 p.m.

56. The CHAIRMAN asked whether the Commission believed that the title "Direct negotiations" reflected a firm UNCITRAL decision.

57. Mr. REICHEL (Observer for the World Bank) said that he supported the United Kingdom proposal in the interests of clarity and transparency.

58. Mr. KASHIWAGI (Japan) also expressed support for the United Kingdom proposal.

59. The CHAIRMAN said that he took it that the Commission wished to adopt the United Kingdom proposal regarding the title of the section comprising recommendations 28 and 29, and similarly to replace the term "direct negotiations" wherever it occurred in the text of those recommendations.

60. It was so decided.

61. Mr. MOHAMMED (Nigeria), referring to the issue of confidentiality raised by the Iranian delegation, said that in the real world it was often not possible to provide the required information, or else the requirement was not respected. He therefore agreed with the Iranian delegation that the matter was best not included in the draft.

62. Mr. WALLACE (United States of America) said that, while Nigeria's point was valid, the very first clause of recommendation 28, to the effect that the law should set forth the exceptional circumstances, constituted both a general record-keeping requirement and indicated that good procurement practice under the UNCITRAL Model Procurement Law required any movement from a competitive to a less competitive or non-competitive method to be justified, along the lines suggested in the United Kingdom proposal. Something had to be said, including at least a reference to approval by a higher authority. Otherwise the normal competitive method could be abandoned altogether without explanation.

63. Mr. WIWEN-NILSSON (Observer for Sweden) said that perhaps the Iranian concern could be addressed under the exception made in recommendation 28 (c) for reasons of national defence or national security.

64. The CHAIRMAN said that a way had to be found, however, to ensure that the principle underlying recommendations 28 and 29 would not be undone by a simple declaration that a particular project affected national security.

65. Ms. FOLLIOT (France) said that two issues were involved. The confidentiality of the negotiations themselves between the two future contracting parties had to be distinguished from the question of recourse to a non-competitive contract award procedure, requiring a subsequent public notice. Nothing had been stipulated, however, about the degree of specificity of that public notice, and therefore a Government could simply invoke one of the exceptions in recommendation 28, for instance, the exception in (c), for reasons of national defence or national security.

66. The CHAIRMAN agreed that the issue was not the confidentiality of the negotiations but rather whether there should be any exceptions to the proposed requirement for public notice and justification.

67. Ms. NIKANJAM (Islamic Republic of Iran) said that her concern had been to have included among the exceptions in recommendation 28 situations requiring confidentiality. She agreed that (c) concerning reasons of national defence or national security would, as suggested, be a good place for such language.

68. Mr. ESTRELLA FARIA (International Trade Law Branch) suggested that the Iranian concern could be accommodated by amending the proposed United Kingdom formulation of the new (c) in recommendation 29, so that it would read: "Except for the situations provided for in recommendation 28 (c), public notices of contract awards should disclose the specific circumstances and reasons for the award without competition." Moreover, the words "of the contract" or "of the project" should probably also be added after the word "award".

69. Mr. DARCY (United Kingdom) accepted the Secretariat's suggestion in response to the concerns of the Iranian delegation.

70. The CHAIRMAN said he took it that the Commission wished to adopt draft recommendations 28 and 29, as reformulated by the United Kingdom and the Secretariat.

71. It was so decided.

72. Draft recommendations 28 and 29, as orally amended, were adopted.

Draft recommendations 30 to 34

73. Draft recommendations 30 to 34 were adopted.

Draft recommendation 35

74. Mr. WALLACE (United States of America) said that the reference at the end of recommendation 35 should be to recommendation 29 (b) to (f), rather than 27 (b) to (f); however that would have to be altered in the light of the United Kingdom amendments just adopted.

75. The kind of unsolicited proposals procedure set out in recommendation 35 contemplated the possibility of negotiations with more than one party, and the Commission must decide where to deal with the issue. It might have been appropriately included as one more exception in the list given in paragraph 89 of the notes (A/CN.9/471/Add.4), in relation to recommendation 28.

76. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the set of provisions regarding negotiations with more than one bidder, which had originally been included in recommendation 29, had been deleted by the adoption of the United Kingdom proposal. In keeping with the principle that the draft Legislative Guide was not intended to replace the procurement regime of the host country, which would continue to provide the framework for negotiations with more than one party, one possibility would be to have the notes describe the principles of competitiveness and transparency that should preside over negotiations more fully than recommendation 29 had done, with references to the relevant provisions of the UNCITRAL Model Procurement Law. That would obviate

the need to include more recommendations on the matter or to reproduce the entire procurement regime in chapter III.

77. Specifically, paragraphs 90 to 96 of the notes (A/CN.9/471/Add.4) - formerly relating to recommendations 28 and 29 - should be shifted to section E, Unsolicited proposals. There should be a general statement to the effect that, whenever the law authorized the contracting authority to award a contract without competition, either under the circumstances referred to in recommendation 28 or in the case of unsolicited proposals, measures to enhance transparency should be followed. The current text of paragraphs 90 to 96 would then follow.

78. The CHAIRMAN said he took it that the Commission agreed that the Secretariat should be entrusted to make the changes indicated.

79. It was so decided.

80. Draft recommendation 35 was adopted.

Draft recommendations 36 and 37

81. Draft recommendations 36 and 37 were adopted.

Draft recommendation 38

82. Mr. WIWEN-NILSSON (Observer for Sweden) suggested that the confidentiality provision originally in recommendation 29 (d), which the Commission had decided to place later in the draft, should be addressed in the context of recommendation 38.

83. Ms. FOLLIOT (France), concurring, said that any recording of key information raised the question of access to that information and the extent to which it should be divulged.

84. The CHAIRMAN said that there were two issues: the fact that recommendation 38 did not set out the circumstances under which the public could or could not have access to such information; and the question whether the law should set out those circumstances.

85. Mr. ESTRELLA FARIA (International Trade Law Branch) said he himself believed that the confidentiality provision should go before recommendation 36, because the obligation of confidentiality was one that applied even before the end of the selection process. The language of former recommendation 29 (d) should be amended to read: "When the contracting authority is authorized to award a project without competition, any such negotiations ...". The point raised by France had been considered the previous year, and it had been thought unlikely that the Commission could arrive at a common understanding of the level of disclosure of records of the selection process in relation to the various types of requests for access. He drew attention to paragraphs 128 to 130 of the notes (A/CN.9/471/Add.4) on the question. In the draft Legislative Guide generally, it was left to the laws of the host country to determine disclosure regulations.

86. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the suggestion made by the Secretariat in response to the concerns expressed by the observer for Sweden.

87. Mr. WIWEN-NILSSON (Observer for Sweden) said that in the report of the Secretary-General (A/CN.9/471/Add.4), the discussion concerning disclosure of confidential information was in paragraph 129, under the heading "Record of selection and award proceedings". In order to ensure consistency between the report and the consolidated legislative recommendations (A/CN.9/471/Add.9), it might be better to place recommendation 29 (d), which dealt with confidentiality, under the same heading in both documents.

88. Mr. ESTRELLA FARIA (International Trade Law Branch) said that while the points made by the observer for Sweden and the representative of France were related, they were not exactly the same. One issue was the disclosure of information contained in the record of the selection proceedings; the other was the confidentiality of negotiations between the contracting authority and the bidders. Those were different situations. Since the obligation of confidentiality during negotiations would apply whenever negotiations took place, the issue should be addressed before the Commission considered the outcome of the selection process. Moreover, in revising the text, the Secretariat should ensure that the notes were consistent, and that references to the confidentiality of negotiations should be in keeping with later statements concerning disclosure of the record of the selection proceedings.

89. The CHAIRMAN said he took it that the Commission agreed that the text of recommendation 29 (d) should be placed after recommendation 38. With regard to the suggestion made by the representative of France that the legislative recommendations should address the issue of what information should be made available regarding the selection proceedings and how it should be made available, the principle adopted thus far was that the matter should be left to national legislation. If that was acceptable to the Commission, then the discussion could move on. If, however, the matter was taken up at the current meeting, that would prolong the debate.

90. Mr. MORÁN BOVIO (Spain) said that he agreed with the Secretariat's approach. The matter should be left to national legislation. There was no point in introducing into the draft Legislative Guide the possibility of modifying firmly entrenched national practices.

91. Mr. LALLIOT (France) said it was clear from paragraphs 128 to 130 of the report that the matter should remain within national jurisdiction by virtue of the principle of subsidiarity. It should be made clear in recommendation 38 also that national law should define the modalities of access to information and records. He also suggested that recommendation 36, concerning review procedures, should be placed at the end of the chapter.

92. The CHAIRMAN noted that the second sentence of recommendation 38 read, in English, "The law should set forth the public access requirements". He wondered whether there might be a discrepancy between the English and French versions.

93. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the second sentence of recommendation 38 was missing in the French version. The Secretariat would rectify the omission.

94. Draft recommendation 38, as orally amended, was adopted.

Draft recommendation 39

95. Mr. SARIE ELDIN (Egypt) said that the title of chapter IV did not reflect the contents, which were not limited to construction and operation of infrastructure. Recommendations 41 and 42 related to the organization of the concessionaire, while recommendations 45 and 47 related to financial arrangements. He suggested that chapters IV and V should be combined, since they both dealt with the project agreement as such.

96. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the chapter had originally been entitled "Project agreement", but that title had not been retained because many of the issues dealt with in the chapter were of a statutory nature and not of a contractual nature.

97. Mr. RENGER (Germany) said that the word "might" should be changed to "should".

98. Mr. WALLACE (United States of America) said that he was not in favour of changing "might" to "should". With regard to the suggestions made by the representative of Egypt, he believed that the approach of combining chapters IV and V was too radical. As to the title of chapter IV, he agreed with the representative of Egypt that it would not be inappropriate to add "project agreement" to the title of chapter IV.

99. Mr. MORÁN BOVIO said that it might be better to reconsider the title of the chapter once the document had been completed.

100. Mr. RENGER (Germany) drew attention to the fact that the words "project agreement" also appeared in chapter V.

101. The CHAIRMAN said that there was insufficient support for combining chapters IV and V.

The meeting rose at 6 p.m.